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No. 75-307

In the Supreme Court of the United States

OCTOBER TERM, 1974

FRANK J. KUTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

NO.

FRANK J. KUTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Frank J. Kuta, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is reprinted as Appendix A, *infra*.

Jurisdiction

The opinion of the Court of Appeals was entered on June 30, 1975. Petitioner's petition for rehearing and suggestion for rehearing in banc, timely filed, was denied on July 29, 1975. (App. B) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22.2 of the Rules of this Court.

Questions Presented

1. Does it not require an unconscionable overextension of the Hobbs Act and of federal jurisdiction to uphold a conviction for affecting commerce by extortion under color of official right, absent proof both of effect on commerce and of extortion?

2. Were petitioner's rights to due process of law and to trial by jury violated, in a Hobbs Act prosecution, where the court failed to instruct the jury as to the definition of "commerce" at all, and the instructions concerning commerce which were given amounted to a directed verdict against defendant as to effect on commerce, an essential element of the offense?

3. Was it not a violation of petitioner's Fifth Amendment privilege against self-incrimination to require him to produce, pursuant to subpoena and at a time when the indictment already was set down for trial, financial records of the law partnership with which he practiced, where the nature of the partnership was shown to be such that the records should have been treated as petitioner's personal records for Fifth Amendment purposes? Does not the Seventh Circuit's ruling that the privilege was inapplicable conflict with principles announced by this Court in *Bellis* v. *United States*, 417 U.S. 85?

4. Was petitioner's constitutional right to a fair trial violated by the prosecutor's improper conduct during closing argument, where:

(A) the court permitted the prosecutor to state that the crucial prosecution witness was "telling the truth";

(B) the prosecutor made various serious misstatements of the evidence; and

(C) the court permitted the prosecutor to read from the trial transcript;

and, further, should this Court, in the exercise of its supervisory power over the lower federal courts, review the novel, unprecedented rule adopted by the Seventh Circuit which permits portions of the transcript to be read to the jury during closing argument, since such practice only can serve improperly to highlight selected portions of the evidence?

5. If the Hobbs Act conviction is overturned, may petitioner nonetheless still stand convicted for having made a false statement on his income tax return for his failure to have reported, as income, the money which was allegedly received as a part of the alleged Hobbs Act violation?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Section 1951, Title 18, United States Code, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> • • •
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
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> • • •

STATEMENT OF THE CASE

Petitioner, Frank J. Kuta, a Chicago alderman during all times pertinent to this cause, was charged in a ten-count indictment (74 CR 22, superseding 73

CR 490) (R. 1)[1] with having violated the Hobbs Act, 18 U.S.C. 1951 (Counts 1, 2 and 3) and the mail fraud statute, 18 U.S.C. 1341 (Counts 4, 5, 6 and 7), and with having made false statements on his income tax returns by knowingly misstating his adjusted gross income (by omitting therefrom the monies he allegedly received via the Hobbs Act violations) for the years 1968, 1969 and 1970, respectively, in violation of 26 U.S.C. 7206(1) (Counts 8, 9 and 10).[2]

The jury acquitted petitioner on Counts 1, 3, 5, 6, 7, 8 and 10, but convicted him on Counts 2, 4 and 9 (those counts

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[1] "A" refers to Appellant's Appendix; "R." to the Record on Appeal; and "Tr." to the Transcript of Proceedings; all are filed in the Court of Appeals in No. 74-1920.

[2] Count 1 alleged that on or about July 8, 1968, petitioner affected commerce by extortion, in that he obtained $4,000 from Theodore Gaw, with Gaw's consent being induced under color of official right, in order to procure a zoning change on property in the 6400 block of Narragansett Ave. in Chicago, Illinois, in the 23rd Ward, of which ward defendant was Alderman.

Count 2 alleged that on or about December 1, 1969, petitioner affected commerce by extortion, in that he obtained $1500 from Sam Vanchieri, whose consent was induced under color of official right, in order to procure a zoning change on property in the 5300 block of S. Kilbourn, 23rd Ward, Chicago.

Count 3 alleged that on or about May 11, 1970, petitioner affected commerce by extortion, in that he obtained $3000 from Al C. Allen, whose consent was induced under color of official right, in order to procure a zoning change as to the same property as that alleged in Count 1.

Count 4 alleged mail fraud in connection with the property alleged in Count 2; and Counts 5, 6 and 7 alleged mail fraud in connection with the three parcels of property alleged in Counts 1 and 3.

Counts 8, 9 and 10 charged that when petitioner filed his income tax returns for the years 1968, 1969, and 1970, respectively, he knowingly falsely stated his adjusted gross income by omitting therefrom amounts equal to the payments he allegedly received in those years as alleged in Counts 1, 2 and 3, respectively.

alleging offenses to which prosecution witness Vanchieri's testimony was crucial).

The court granted petitioner's motion for acquittal as to Count 4 (mail fraud count; A. 9), but denied the motion as to Counts 2 and 9. Motions for new trial and in arrest of judgment were also denied. (A. 9).

Petitioner was sentenced to six months in custody. (A. 9).

• • • •

In summary, the government's evidence relating to Counts 2 and 9[3] is as follows:

Petitioner, an attorney and Alderman of the 23rd Ward, Chicago, Illinois, was a member of the City Council. Sometime before July, 1969, Sam Vanchieri, a realtor in Chicago, contacted petitioner concerning zoning changes which Vanchieri desired to obtain as to certain property located in the 23rd Ward. (Tr. 129) Petitioner and Vanchieri had known one another for some years, but never had any transactions wherein Vanchieri paid petitioner anything. (Tr. 125) At this initial meeting, money was never discussed. (Tr. 129, 145)

On October 10, 1969, the rezoning ordinance was approved by the Zoning Committee (Tr. 49), and on November 17, 1969, it was passed by the City Council. (Tr. 129)

On December 1, 1969, petitioner phoned Vanchieri—not mentioning money—and said he would like to see Vanchieri. Vanchieri, in possession of a blank check from his

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[3] Details of the evidence necessary to petitioner's arguments attacking Counts 2 and 9 are fully set forth during the course of this Petition where pertinent, and are not repeated herein to avoid unnecessary duplication.

own checking account, went to petitioner's office and—according to Vanchieri's own testimony—Vanchieri asked petitioner, "How much do I owe you," and petitioner replied, "'$1500," which Vanchieri proceeded to pay petitioner via filling out the check he had brought with him. (Tr. 130-31) The check was made payable by Vanchieri to himself, and on the back bore the words, "Okay, Atty. Kuta," in defendant's handwriting, followed by petitioner's account number. (Tr. 134) Vanchieri testified that he, not petitioner, brought up the issue of money. (Tr. 131, 144-45)

Vanchieri testified: "I thought I owed him [petitioner] something for not objecting to the zoning." (Tr. 140).

He did *not* testify that money was ever discussed prior to December 1, 1969, or that petitioner ever threatened to oppose rezoning if not paid, or that he ever agreed to refrain from opposing the rezoning in exchange for money. (Tr. 131, 144-45)

The government, in support of Count 9, presented evidence that petitioner's tax return for 1969 did not reflect this alleged $1500 payment. (Tr. 1021)

Petitioner testified that Vanchieri, whom he had known for some time, came to petitioner's law offices and explained that he needed to cash a check, but was not known to anyone at the bank located in the same building as petitioner's offices, at which bank petitioner had an account. Petitioner testified that he wrote, "Okay, Atty. Kuta," on the back of the check, and supplied Vanchieri with his (petitioner's) bank account number, so as to enable Vanchieri to cash the check at the bank, where petitioner was well known. (Tr. 1418-21)

Petitioner in his testimony also denied having illegally received the cash payments as alleged in Counts 1 and 3, and the jury acquitted him as to those Counts, *inter alia*.

REASONS FOR GRANTING THE WRIT

1.

The evidence was insufficient to establish that petitioner violated the Hobbs Act, in that there was no proof of effect on interstate commerce, nor that petitioner committed extortion. Petitioner's conviction is based on an unconscionable overextension and misreading of the Hobbs Act absent any proper basis for federal jurisdiction.

To sustain a conviction under the Hobbs Act, two essential elements must be alleged and proven:

> ". . . interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." *Stirone* v. *United States,* 361 U.S. 212, 218 (1960).

Here, the government's case fails to establish either that defendant committed extortion or that he "did obstruct, delay and affect commerce" as charged in Count 2.

Concerning Count 2, all the government's evidence demonstrates is that some time *after* passage of the zoning ordinance in which Vanchieri was interested, Vanchieri received a phone call from petitioner and went to see him at petitioner's office.[4] (Tr. 130) Money had not, up to

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[4] The rezoning ordinance was passed by the City Council on November 17, 1969, (Tr. 129), and, according to Vanchieri, petitioner phoned him on December 1, 1969, the date on which petitioner allegedly received the money from him. (Tr. 130) This was their sole and only contact.

that point, even been discussed between the two of them, nor had they ever had any transactions together from which Vanchieri could reasonably have concluded that payment was necessary to prevent petitioner from objecting to the zoning ordinance. Entering petitioner's office, Vanchieri asked, "How much do I owe you," and petitioner said, "$1500," which Vanchieri proceeded to pay by check.[5] (Tr. 131)

Even if Vanchieri believed that he "owed" petitioner something, payment of the $1500 *after the fact*, that is, *after* the rezoning had been passed by the City Council, cannot be deemed extortionate, absent any conversations to that effect prior to action by the City Council, and absent any prior dealings between the parties concerning such matters.

The Seventh Circuit's legal conclusions are not supported by the facts of record:

> "[Since] it was Kuta's office [as alderman] that brought forth Vanchieri's payment, . . . the defendant committed extortion. [App. A. p. 4] Although the payment occurred after the zoning amendment was passed, and the evidence does not indicate that prior to its passage payment was explicitly discussed, the jury could infer that an agreement existed from the fact that payment was expected by the defendant, and

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[5] This, of course, is Vanchieri's version of the transaction. Petitioner testified that Vanchieri's $1500 check bore petitioner's signature on the back purely as an accommodation to Vanchieri, who wished to cash the check at the bank located in petitioner's office building, at which bank he (Vanchieri) was not known. (Tr. 1418-21) It is petitioner's position herein that, even taking the evidence most favorably to the government—*i.e.*, assuming, *arguendo*, the truth of Vanchieri's testimony—the evidence is insufficient to establish the offense.

> that Vanchieri so understood. . . . This supports a finding that there existed a tacit understanding according to which the defendant refrained from objecting to the zoning amendment in return for a subsequent payment of money, and that this restraint affected the passage of the amendment. Consequently, the jury could find that the extortion affected commerce, and that the defendant thereby violated the Hobbs Act." (App. A. pp. 5-6)

These conclusions of law are based, not upon facts, but upon inferences drawn from still other inferences. The facts remain that the zoning amendment was passed without any discussion between petitioner and Vanchieri regarding payment, that petitioner expressed no objection to the proposed amendment (with no discussion of money), and that at the time payment was made,[6] the amendment (affecting commerce) already had been passed.

The second and third degree inferences which the court had to draw in order to justify affirmance upon these facts are insufficient in law to support conviction herein.

Moreover, the court's reliance on other cases concerning this issue is misplaced. *United States* v. *Braasch*, 505 F.2d 139, 151 (7 Cir. 1974), states (as noted by the panel, App. A, p. 4), that:

> "The use of office to obtain payments is the crux of the statutory requirement of 'under color of official right'. . . So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951."

However, this language does not apply to the facts of the case at bar, where defendant did *not* perpetrate any such "conduct" as was perpetrated by the various defendants

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[6] See footnote 5, *supra*.

in the *Braasch* case, wherein police officers were actively soliciting "protection money" from local tavernkeepers and other businessmen. To make the *Braasch* language applicable herein is to take a legal doctrine out of context and misapply it to an inapposite factual situation.

Literal interpretation of the quoted language from *Braasch* without reference to the factual context within which it arose amounts to punishing petitioner for the mere receipt of money after the fact without there having been any showing that any promise or expectation of payment was contemplated by petitioner. To punish him solely for the state of mind and actions of Vanchieri—which is what affirmance of his convictions herein amounts to—not induced by anything petitioner himself said or did, violates every basic precept of criminal justice.

By ruling that petitioner's receipt of $1500 from government witness Vanchieri under the circumstances of the case at bar constitutes a violation of the Hobbs Act (interference with interstate commerce by extortion) (Count 2), (App. A, pp. 2-6), the court in effect has eliminated the requirement that petitioner be proven to have *done* something in violation of the law. He stands convicted, via the court's ruling, because of Vanchieri's state of mind which admittedly was *not induced by anything petitioner said or did.* This flies in the face of basic principles of criminal jurisprudence which contemplate punishing a man only for what he himself has done, not for what the acts of others[7] may have caused another to believe.

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[7] *I.e.*, others for whose acts and conduct petitioner cannot be held criminally liable. There is intimation that evidence pertaining to others regarding zoning could be considered by the jury in assessing petitioner's guilt (see App. A. pp. 4-5); however, absent any evidence that Vanchieri was *aware* of any such tranactions, there still is lacking any evidence that Vanchieri's payment was in any way induced by any *conduct* on petitioner's part.

The court's reliance on *United States* v. *Staszcuk*, 502 F.2d 874 (7 Cir. 1974), *rev'd in part on other grounds en banc*, Slip op. No. 73-1869 (May 16, 1975), (cert. pndg. No. 74-1574) (App. A, p. 5), is similarly misplaced. In *Staszcuk*, there was that essential ingredient which is entirely and conspicuously absent from the case at bar—a *prior agreement* by the alderman-defendant not to object to proposed zoning amendments. The Court found in *Staszcuk* that the payments were made to defendant by a "zoning consultant",

> "on behalf of his clients in return for defendant's agreement not to oppose their applications for zoning amendments . . ." 502 F.2d at 877.

Accordingly, the court concluded:

> "*To accept money in return for an agreement* not to oppose such applications—in effect to suspend independent judgment on the merits of such zoning changes—constitutes obtaining property from another, with his consent, induced under color of official right. The evidence supports defendant's convictions for extortion." *Id.* at 878. (Emphasis added.)

In the case at bar, however, *no* such agreement was demonstrated by the record, and the panel's inference of a "tacit agreement" is not supported by facts of record, but rather, impermissibly is based only upon inference piled upon inference.[8]

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[8] Moreover, in *Staszcuk*, the court specifically found that the government had presented sufficient evidence of an alderman's influence over zoning applicants in his own ward from which the jury could conclude that petitioner's official functions encompassed unbiased consideration and treatment of zoning applications. 502 F.2d at 878. No similar evidence is of record in the instant case, nor would it be proper to assume such fact without any evidence from which it might properly be concluded.

Finally, from the evidence of record there is no basis from which the jury could properly conclude that there was any factual relationship between the rezoning and the subsequent payment to petitioner by Vanchieri. While the rezoning may have facilitated the use of materials from interstate commerce in the construction and furnishing of buildings which could not have been built under the prior zoning, there simply is no demonstrable connection between petitioner's receipt of the money and the prior rezoning.[9] Absent evidence of any such connection between petitioner's conduct and the eventual effect on commerce, the evidence is utterly insufficient to demonstrate that petitioner "did obstruct, delay and affect commerce" as charged in Count 2.

There was no evidence that money was ever discussed before December 1, 1969; no evidence that petitioner ever threatened to oppose rezoning if not paid; no evidence that petitioner ever agreed or even intimated that he would refrain from opposing the rezoning in exchange for a promise of future payment of money. Moreover, the buildings (using materials which had moved in interstate commerce) were not constructed until approximately a year after petitioner allegedly received the money from Vanchieri. (Tr. 206-09)

Whatever Vanchieri may have believed, such belief did not emanate from anything petitioner said or did. *Cf. United States* v. *Staszcuk, supra,* at 878. Nor was there here any threat to obstruct the rezoning prerequisite to the proposed construction unless petitioner were paid. *Cf. United States* v. *Pranno,* 385 F.2d 387 (7 Cir. 1967), where "delay would have been caused had the owner and contractor refused payment and defendants carried out their threat to withhold the permit." *Id.* at 390.

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[9] See footnote 4, *supra.*

This case involves nothing more than the voluntary, unsolicited payment of money to an alderman which, if it is to be prosecuted, may and should be prosecuted pursuant to local law. The sole federal jurisdictional nexus—affecting commerce—is utterly absent upon these facts. See *United States* v. *Enmons,* 410 U.S. 396, 411-12 (1973).

Certiorari should be allowed so that this Court may speak to a proper construction of the Hobbs Act with a view toward curtailing the recent trend toward federal encroachment via use of the Act into matters of purely local concern.[10]

2.

Petitioner's rights to due process of law and to trial by jury were violated where the court failed to instruct the jury as to the definition of "commerce" at all, and the instructions concerning commerce which were given amounted to a directed verdict against petitioner as to effect on commerce, an essential element of the offense.

Absent from the trial court's charge is *any* definition, statutory or otherwise, of "commerce," an essential element of the Hobbs Act count. 18 U.S.C. 1951(b)(3).

Count 2 charged that petitioner interfered with commerce by extortion, by obtaining $1500 not rightfully due him from Vanchieri, whose consent was induced under color of official right.

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[10] Current gross overextensions of the Hobbs Act, with an increasing disregard for the basis of federal jurisdiction, results in burdening the federal court system with matters of purely local concern, and renders the Act applicable to conduct to which it was never intended to apply. See, *e.g., United States* v. *Staszcuk, supra,* especially the pending petition for certiorari (No. 74-1579) filed June 13, 1975. There the Seventh Circuit has found the federal jurisdictional element satisfied merely by a showing of "reasonable probability" that commerce may be affected, absent any actual effect upon commerce.

To sustain a conviction under the Hobbs Act, two essential elements must be alleged and proven:

> ". . . interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. *The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference.*" *Stirone* v. *United States,* 361 U.S. 212, 218 (1960). (Emphasis added.)

It was incumbent upon the court properly to instruct the jury as to the statutory definition of the word "commerce"; this the court utterly failed to do.[11]

> "In the final analysis it is not the parties who determine the charge the judge gives to the jury; the obligation rests squarely on the shoulders of the trial judge." *Williamson* v. *United States,* 332 F.2d 123, 132 (5 Cir. 1962).

And the Supreme Court has held, in *Screws* v. *United States,* 325 U.S. 91, 107 (1945):

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion."

Here, defendant made timely objection to the court's omission of any definition of commerce from the charge. (Tr. 2185-86)

The interstate commerce question in a Hobbs Act case is an issue which must be submitted to the jury. *United States* v. *Kramer,* 355 F.2d 889, 899-90 (7 Cir. 1966); *United States* v. *Battaglia,* 394 F.2d 304, 312 (7 Cir. 1968).

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[11] It should further be noted that the court did read to the jury the statutory definition of "extortion," (Tr. 2156), and elaborated thereon as pertinent to the evidence in the case at bar (Tr. 2156-57); however, nothing in the charge contained any definition of "commerce."

Similarly, under other criminal statutes depending upon a finding of commerce to sustain federal jurisdiction, it has uniformly been held that failure properly to instruct the jury as to this element constitutes reversible error. *Schwachter* v. *United States,* 237 F.2d 640, 644 (6 Cir. 1956) (Dyer Act); *Wolf* v. *United States,* 36 F.2d 450 (7 Cir. 1929) (Dyer Act); *United States* v. *Gollin,* 166 F.2d 123, 126 (3 Cir. 1948) (theft from interstate shipment).

Over objection,[12] the court instructed the jury with respect to Count 2 as follows:

> "In reference to the statutory requirement of the law that commerce be affected, you are instructed as a matter of law that there was such an effect on interstate commerce and the necessary Federal jurisdictional element is satisfied if you find beyond a reasonable doubt . . . in respect to Count 2, . . . that materials used in the construction or furnishing of buildings constructed in 1970 at 5316, 5318, and 5322 South Kilbourn . . . Avenue, Chicago, Illinois were manufactured or shipped from outside the state of Illinois, and that the buildings which were built on that Kilbourn Avenue property could not have been built under the pre-existing zoning ordinance." (Tr. 2157-58)

Although the charge as given leaves certain factual determinations to the jury, *i.e.,* whether materials or furnishings used in the buildings constructed on the Count 2 property in 1970 came from out of state, and whether the buildings could have been constructed under the pre-existing zoning ordinance, the jury was advised *as a matter of law* that, finding such facts to have been established, they *must,* not may, but *must* find that commerce was affected by

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[12] In addition to objecting at the pre-charge conference on instructions, (Tr. 2184), petitioner also noted his continuing objection to such instruction, particularly in light of the court's failure to have instructed upon the definition of "commerce," after conclusion of the charge. (Tr. 2185-86)

petitioner's conduct vis â vis Vanchieri. Yet a real factual question was at issue, since the ordinance passed before the payment, and the construction utilizing materials from out of state took place about a year thereafter. (See p. 13, *supra.*)

This instruction is a partial directed verdict of guilty and an invasion of the province of the jury in derogation of defendant's right to trial by jury. Although the factual issues as noted above were delegated to the jury, removed from their consideration was the further factual question whether this state of facts, if found to exist, justified a finding that commerce was affected, an essential element of the Hobbs Act charge. *Stirone* v. *United States,* 361 U.S. 212, 215-18 (1960).

The court may not thus invade the province of the jury.

> "An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty [which is] prohibited . . . ." *Mims* v. *United States,* 375 F.2d 135, 148 (5 Cir. 1967).

Accord: United States v. *Skinner,* 437 F.2d 164 (5 Cir. 1971); *United States* v. *Raub,* 177 F.2d 312, 316 (7 Cir. 1949); *United States* v. *Gollin,* 166 F.2d 123 (3 Cir. 1948).

Insofar as the cases cited by the Seventh Circuit (App. A, p. 7), *United States* v. *Green,* 246 F.2d 155 (7 Cir. 1957), and *United States* v. *Hyde,* 448 F.2d 815 (5 Cir. 1971), may support the court's conclusion, we submit that these holdings should to that extent be disapproved as in direct conflict with the constitutional right to trial by jury and as amounting to approval of partial direction of a verdict by the court concerning an essential element of the offense.

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The court's affirmance herein despite the trial court's direction of a verdict on the issue of effect on interstate

commerce, together with its omission of any definition of commerce from the jury charge, (App. A, pp. 6-8), amounts to permitting the trial court in every instance to rule on an essential element of the offense, in violation of petitioner's constitutional right to trial by jury upon the factual issues in the case. That the essential element happens to constitute a jurisdictional fact cannot suffice to justify what happened here.

3.

Petitioner's Fifth Amendment privilege against self-incrimination was violated when he was required to produce—pursuant to subpoena and at a time when the indictment already was set down for trial—financial records of the law partnership with which he practiced, where the nature of the partnership was shown to be such that the records should have been treated as petitioner's personal records for Fifth Amendment purposes. The Seventh Circuit's ruling that the privilege was inapplicable conflicts with principles announced by this Court in Bellis v. United States, 417 U.S. 85.

After return of the instant indictment, and at a time when the cause already had been set down for trial, the government served upon petitioner a subpoena duces tecum requiring him to produce the records of the law partnership of Kash and Kuta. Petitioner's motion to quash the subpoena was denied (R. 35) and, under threat of contempt, he duly produced the records specified in the subpoena.

The government proceeded to use in evidence against petitioner, over objection, various portions of said records and information contained therein. (Tr. 963)

The records which defendant was thus compelled to produce constituted private records immune from such seizure by the government by virtue of the Fifth Amendment.

Boyd v. *United States*, 116 U.S. 616 (1886). The trial and reviewing courts' reliance below upon *Bellis* v. *United States*, 417 U.S. 85 (1974), (App. A, pp. 8-12), is misplaced, since the instant case is materially distinguishable from the controlling facts in *Bellis*.[13]

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[13] At the hearing upon his motion to quash the subpoena, and subsequently, upon his objection to introduction of material from the subpoenaed documents, petitioner established the following uncontroverted facts concerning the law partnership of Kash and Kuta, as contained in petitioner's affidavit filed in support of the motion to quash:

"FRANK J. KUTA, being first duly sworn on oath, deposes and says:

That he is the defendant herein;

That he is a duly licensed attorney in the State of Illinois;

That he is a member of the law firm of Kash and Kuta;

That there is no formal or written agreement evidencing the existence of any partnership, although he and Bernard Kash share office expenses and at the end of a respective year divide the income from the operation of the law business conducted under the foregoing name.

That both he and Kash conduct their business with clients on a personal basis and that each personally records his own individual transactions with clients and each keeps his own record of income derived from clients in the conduct of their law business.

That your affiant personally handled all of his individual clients and files and his business matters and all entries of income and costs recovered from said clients were made by him, personally.

That all entries of income received by Bernard Kash from his clients were made personally by Mr. Kash, in his own handwriting.

Your affiant further shows that no other person than he or Bernard Kash had access to the income folders or the records of income received by either of them.

Your affiant further shows that all disbursements for costs or maintenance of the office were handled through a common checking account and checks were signed either by your affiant

(footnote continued)

In *Bellis, supra,* this Court held that a former partner in a law firm which had since been dissolved was not en-

(footnote continued)

or by Mr. Kash and that no other person made entries in the books and records except your affiant and Bernard Kash.

The only instances in which any other person was involved in any of the making or keeping of records of income was in the preparation at the end of each week of tape showing the receipts for such week for the purpose of attaching such tape to deposit slips and in such instances the tape may have been prepared by a secretary under the direction of either your affiant or Bernard Kash." (Affidavit filed in support of motion to quash subpoena duces tecum, R. 33)

Petitioner asserted in his motion to quash, *inter alia,* the following, also uncontroverted:

"(3) The books, records and documents called for in the subpoena include the private, personal papers and records of the defendant and are held and possessed by him in a purely personal capacity.

(4) That said books, records and documents are not held by him simply as a custodian or in a representative capacity but constitute his personal and private papers.

(5) The books, records and documents called for by the subpoena reflect his personal business transactions with his own individual clients and the records which reflect income to the defendant were kept and made by him, personally, in his own handwriting.

(6) The records of the income to this defendant were not kept by an accountant or secretary or any other person and he has never lacked control over their content and location nor has he ever relinquished the right to keep the entry of his income from the view of others.

(7) The financial records called for by the subpoena are not the records of an organized collective entity and each member of the firm of Kash & Kuta keeps and maintains his own individual record of his respective income.

* * *

(10) To compel the production of the records called for in the subpoena would violate the attorney-client privilege by disclosure of transactions had with said clients." (R. 33)

titled to invoke his personal privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership's financial records, "in the circumstances of this case." *Id.* at 95, 101.

"The circumstances of this case" in *Bellis* included the following factors which clearly serve materially to distinguish it from the case at bar:

(1) *Bellis* involved a three-man partnership engaged in the practice of law, which employed two additional attorneys, three secretaries, and a receptionist. The Court specifically found that the partnership "employed six persons in addition to its partners, including two other attorneys who practiced law on behalf of the firm, rather than as individuals on their own behalf." *Id.* at 97. In the case at bar, Kash & Kuta were the only practicing attorneys. Their secretary (and only employee) did not keep the books and records.

(2) The records in *Bellis* were "merely the financial books and records of the partnership." *Id.* at 98. This Court noted that no files reflecting work Bellis had personally performed on behalf of his clients were included in the scope of the lower court's order to produce, *id.* at 98, fn. 9, stating that "A different case might be presented if petitioner had been ordered to produce" such records. In the case at bar, the records covered by the court's order *did* include defendant's client records, thus removing the case from *Bellis'* scope.[14]

(3) In *Bellis*, this Court found that the partnership there "did have an established institutional identity inde-

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[14] See par. 10 of motion to quash subpoena, R. 33, asserting attorney-client privilege, set forth in footnote 13, p. 20, *supra*.

pendent of its individual partners." *Id.* at 95. This conclusion cannot be reached on the facts of the case at bar, where no such "institutional identity" exists, in that the law firm does not exist apart from its two individual practitioners.

(4) In *Bellis,* unlike the case at bar, "petitioner was content to leave these records with the other members of the partnership at their principal place of business for more than three years after he left the firm." *Id.* at 97.

This Court in *Bellis* repeatedly recognized that its ruling was not a blanket ruling automatically applicable to all cases involving attempts to subpoena partnership records:

> "We think it is similarly clear that partnerships *may and frequently do* represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records." *Id.* at 93. (Emphasis added.)
>
> "Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, *many of these firms will be independent entities, whose financial records are held* by a member of the firm *in a representative capacity.*" *Id.* at 100-01. (Emphasis added.)

By choosing the above phraseology, this Court obviously envisioned partnerships which do *not* so represent "organized institutional activity" as to preclude personal assertion of the privilege by a partner, and which are *not* such "independent entities" that their financial records cannot be held in a purely personal, rather than a representative, capacity.

We submit that the law firm of Kash and Kuta was just such a partnership as this Court envisioned as being outside the holding of *Bellis*.

Only if *Bellis* pronounced a blanket rule applicable to all partnerships could it conceivably be applied to the case at bar, and, clearly, in the light of the foregoing language and the Court's careful limitation of that holding to the particular facts and circumstances of the case then before it, no such all-encompassing rule was laid down therein.

Moreover, it must be remembered that the records in the case at bar were not compelled to be produced until *after* indictment and *after* the case had been set for trial; in *Bellis* the matter was merely in the investigative stage. Together with the facts concerning the operation of the partnership and the manner in which the books were kept, this clearly demonstrates petitioner's personal interest in the records which he was compelled to produce herein. Nor, under these circumstances, can the government maintain that production of the records was necessary to its investigation; its only purpose in compelling petitioner to produce them at that stage of the proceedings was to force him to incriminate himself on the basis of his personal papers, forbidden by the Fifth Amendment.

> "The command of the Fifth Amendment . . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly fashion." *Ullmann* v. *United States*, 350 U.S. 422, 426 (1956).

We submit that applying the holding of *Bellis* to the facts of the case at bar constitutes just such a "nig-

gardly fashion'' of constitutional interpretation which this Court has disavowed. It flies in the face of the undisputed facts concerning the operation of the partnership of Kash and Kuta, and renders *Bellis* a universal rule applicable to all partnerships regardless of the individual facts, contrary to the express language of the Court in *Bellis* itself.

The Seventh Circuit's unfounded conclusion that no attorney-client materials were contained in the requested records, (App. A, p. 8, fn. 8), is based on its limited view of "financial records" as not conceivably revealing privileged attorney-client matters. Although the files may not have contained work performed on behalf of clients, the very identity of an attorney's client, or the fact that the client has retained an attorney, may constitute privileged information. *Tillotson* v. *Boughner,* 350 F.2d 663 (7 Cir. 1965). Moreover, there is nothing of record to dispute petitioner's uncontroverted allegation that "To compel the production of the records called for in the subpoena would violate the attorney-client privilege by disclosure of transactions had with said clients." (R. 33)

Because the Seventh Circuit seriously has misconstrued this Court's decision in *Bellis* v. *United States,* and thereby has approved petitioner's having been compelled to incriminate himself (and to produce privileged attorney-client material), certiorari should be granted herein.

4.

Petitioner's right to a fair trial was violated by the prosecutor's improper conduct during closing argument. In particular, this Court, in the exercise of its supervisory power over the lower federal courts, should review the novel, unprecedented rule adopted by the Seventh Circuit which permits portions of the transcript to be read to the jury during closing argument, since such practice only can serve improperly to highlight selected portions of the evidence.

During closing argument, the prosecutor repeatedly read to the jury portions of the trial transcript, all defense objections thereto being overruled by the court. (Tr. 2087, 2101-02, 2103, 2119-20) This was prejudicial, since it had the effect of improperly emphasizing to the jury certain selected matters in evidence.

In fact, this procedure was contrary to the court's own instruction to the jury that it is solely their duty to determine the facts from the evidence presented in the case, (Tr. 2142), and, moreover, was contrary to the court's position upon defense objections to the prosecution's frequent misstatement of facts. In that regard, the court told the jury that it was their sole province to remember the facts from the evidence which had been presented.[15]

While no federal authority directly in point was discovered, persuasive authority from the Illinois courts condemns reading from a transcript during closing argument to the jury. The rationale for this rule forbidding such

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[15] See, *e.g.*, Tr. 2095-96, 2125; in each instance, upon defense objection that the prosecution had misstated the evidence, the court advised the jury that they were to remember the evidence.

reading from transcripts has logically and succinctly been stated as follows:

> "Reading from a trial transcript or from a memorandum of the testimony during closing arguments is improper. The jury must pass upon the whole testimony free of the over-emphasis given any portion of it by verbatim repetition during the trial's waning moments." *People* v. *Hoggs*, 17 Ill.App.3d 67, 307 N.E. 2d 800, 802 (1 Dist. 1974).

In reaching this conclusion, and reversing, the Appellate Court relied upon *People* v. *Willy*, 301 Ill. 307, 133 N.E. 859 (1921) (an Illinois Supreme Court case), and *People* v. *Smith*, 105 Ill.App.2d 8, 245 N.E.2d 23 (1 Dist. 1969).

In the case at bar, reading from the transcript over repeated objections served not only improperly to over-emphasize portions of the testimony to the jury, as noted in the cases cited above, but also caused defense counsel to appear to the jury as attempting to keep certain matters from them. The prejudicial impact of the selective over-emphasis cannot be doubted in the face of the jury verdicts finding petitioner guilty only on the Counts involving prosecution witness Vanchieri, whose testimony was improperly read to the jury.

The prejudicial effect of the unfavorable light in which defense counsel necessarily appears in the eyes of the jury, because of his having been forced to object to the prosecution's improper conduct in the jury's presence, cannot realistically be assessed. *Cf. Ginsberg* v. *United States*, 257 F.2d 950, 955 (5 Cir. 1958), holding that failure to object to certain matters in closing argument does not amount to waiver of these errors by the defense, in view of the magnified prejudicial impact which would necessarily follow where counsel is forced to object or move for mistrial in the jury's presence. Here, counsel did ob-

ject, and the court's overruling of said objections served not only to emphasize the challenged argument but also to convey to the jury the prejudicial impression, understandable in laymen, that defense counsel was trying to conceal something from them.

The panel's conclusion that the prosecuting attorney's closing argument was not improper is based upon (1) its ill-advised adoption of a novel rule permitting portions of the trial transcript to be read in closing argument, (App. A. pp. 12-13); (2) its naively having assumed that the jury could, as astutely as could the panel members, realize that the prosecutor was "merely" arguing from the evidence that Vanchieri was telling the truth, rather than impermissibly putting his own (*i.e.*, the prosecutor's) credibility in issue (App. A, p. 13); and (3) its completely having overlooked the misstatements contained in the prosecutor's argument, amazingly concluding that no such misstatements occurred, and its unfounded assumption that the effects of the single admitted misstatement *re* the statute of limitations were cured by the court's attempted curative instructions. (App. A, pp. 13-14)

Reasoning that since the trial court possesses discretion to have portions of the transcript read to the jury at their request, the panel adopts a similar rule with regard to the propriety of the prosecutor reading selected portions of the transcript during closing argument. (App. A, pp. 12-13) However, this is not a logical extension of the former principle; for it is one thing for a perplexed jury trying to remember the evidence during deliberations to request that portions of the transcript be furnished for their use, and quite another to permit the prosecutor to read portions of the transcript to the jury as part of his argument, where no juror has expressed any uncertainty as to the evidence in question. Permitting such reading

during argument only can serve improperly to highlight certain portions of the evidence to the jury, as is recognized in the Illinois cases cited above. (See App. A, p. 13, fn. 12.)

The panel has cited no federal authority supportive of its ill-advised and novel procedural rule. It seems extremely appropriate that this Court consider this issue rather than permitting the Seventh Circuit's unprecedented adoption of such rule to stand as the law.

Moreover, improper and prejudicial prosecution conduct during closing argument occurred when the court permitted the prosecutor to state that Vanchieri, the crucial prosecution witness, was "telling the truth,"[16] and when the court failed to correct some serious factual misstatements made by the prosecutor.[17] If certiorari is allowed,

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[16] Tr. 2087-88.

Clearly government counsel may not tell the jury, as he did here, that a witness was telling the truth. In context, the prosecutor's statement was not merely an argument based upon the evidence; counsel's statement herein, put as a matter of fact, necessarily means that counsel believed the witness, thus putting his (counsel's) own credibility in issue. This argument is indisputably improper and constitutes grounds for reversal. *United States* v. *Handman,* 447 F.2d 853, 856 (7 Cir. 1971); *United States* v. *Lamerson,* 457 F.2d 371, 372 (5 Cir. 1972); *Hall* v. *United States,* 419 F.2d 582, 586 (2 Cir. 1969); *Greenberg* v. *United States,* 280 F.2d 472, 474-75 (5 Cir. 1960).

[17] Tr. 2090, 2096, 2107-09, 2125, 2132-39, 2151, 2186-88.

The misstatements—all uncorrected or insufficiently corrected by the court, constitute reversible error herein in light of the weakness of the case against petitioner coupled with the critical importance of the jury's credibility determination as between petitioner and Vanchieri. *Jones* v. *United States,* 338 F.2d 553 (D.C. Cir. 1964), *Corley* v. *United States,* 365 F.2d 884 (D.C. Cir. 1966); *King* v. *United States,* 372 F.2d 383 (D.C. Cir. 1967); see *Cross* v. *United States,* 353 F.2d 454 (D.C. Cir. 1965).

petitioner asks leave to develop these additional matters in his Brief.

To review the Seventh Circuit's novel and unprecedented rule permitting portions of transcripts to be read to the jury during closing arguments, as well as to ascertain whether permitting such reading, together with the other improprieties in closing argument alluded to above, deprived petitioner of a fair trial, certiorari should be allowed.

5.

If petitioner's conviction for having violated the Hobbs Act (Count 2) is overturned, petitioner may not stand convicted for having made a false statement on his income tax return for his failure to have reported, as income, the money which he allegedly received as a part of the Hobbs Act charge.

If the jury's determination, via its finding of guilty upon Count 2, that petitioner did receive $1500 from Vanchieri during 1969, is overturned, this removes the sole factual basis upon which a finding of guilty upon Count 9 may be based. Hence, either reversal or reversal and remand upon Count 2 requires vacature of petitioner's conviction upon Count 9 as well.

Conclusion

For any or all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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